Supreme Court, U.S.
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No. 98-1207

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

PATRICIA A. TURNER,
Petitioner,

versus

RICHARD A. FREY, JR., Et Al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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3298

PARTIES TO THE PROCEEDING

The petition does not accurately list the respondents to the proceeding because no "Doe" defendants were ever served with summons and Complaint or otherwise made a part of the district court action or appeal to the United States Court of Appeals for the Sixth Circuit.

TABLE OF CONTENTS

	PAGE
PARTIES TO THE PROCEEDING	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	8
I. The Court of Appeals for the Sixth Circuit properly affirmed the judgment of the district court	9
II. Plaintiff's Complaint did not allege an unconstitutional use of force claim or an assault and battery claim	12
III. There is no genuine issue of material fact	14
IV. Plaintiff was not improperly assigned the burden of proof	15
V. Plaintiff did not establish an unconstitutional policy or custom which caused the injuries	16
CONCLUSION	18

TABLE OF AUTHORITIES

PAGE

Cases:

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242, 246 9
Board of County Commissioners of Bryan County, Oklahoma v. *Brown*, 117 S.Ct. 1382 (1997) 17
Boretti v. *Wiscomb*, 930 F.2d 1150 (6th Cir. 1991) 11
Byrd v. *Wilson*, 701 F.2d 592, 594, n.1 (6th Cir. 1983) 10
Campbell v. *United States*, 365 U.S. 85, 81 S.Ct. 421 (1961) 15
Celetex Corp. v. *Catrett*, 477 U.S. 319, 106 S.Ct. 2548 (1986) 9
City of Canton v. *Harris*, 489 U.S. 378, 109 S.Ct. 1197, 1205-1206 (1989) 16, 17
Danese v. *Asman*, 875 F.2d 1239, 1243 (6th Cir. 1989) 9, 12
Estelle v. *Gamble*, 429 U.S. 97, 97 S.Ct. 285 (1976) 10, 11
Farmer v. *Brennan*, 114 S.Ct. 1970, 1979 (1994) 10, 11, 12
Flagg Brothers, Inc. v. *Brooks*, 436 U.S. 149 (1978) 9, 16
Hays v. *Jefferson County*, 668 F.2d 869 (6th Cir. 1982) 17
Johnson v. *Hardin County, Kentucky*, 908 F.2d 1280 (6th Cir. 1990) 11
Matsushita Electric Industrial Co. v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986) 9
Monell v. *Department of Social Services*, 436 U.S. 658, 690-94, 98 S.Ct. 2018 (1978) 16
Oklahoma City v. *Tuttle*, 471 U.S. 808, 105 S.Ct. 2427 (1985) 17
Parrish v. *Johnson*, 800 F.2d 600, 604-605 (6th Cir. 1986) 11
Preston v. *Smith*, 750 F.2d 530, 535 (6th Cir. 1984) 10
Rich v. *City of Mayfield Heights*, 955 F.2d 1092 (6th Cir. 1992) 11

PAGE

Roberts v. *City of Troy*, 773 F.2d 720, 723 (6th Cir. 1985) 9

United States v. *Denver and Rio Grande Railroad Co.*, 191 U.S. 84, 24 S.Ct. 33 (1903) 16

United States v. *New York, New Haven and Hartford Railroad Co.*, 355 U.S. 252, 78 S.Ct. 212 (1957) 15

Wilson v. *Seiter*, 501 U.S. 294, 111 S.Ct. 2321 (1991) 9, 10

Statutes:

42 U.S.C. §1983 ..... 1, 9, 16

STATEMENT OF THE CASE

On August 15, 1991, Petitioner (hereafter referred to as "Plaintiff") filed an action pursuant to 42 U.S.C. §1983 alleging a violation of the Constitutional right to adequate medical care in connection with the death of inmate Stanley R. Shepherd on August 18, 1990. Shepherd was incarcerated in the Jefferson County Jail from August 17, 1990 to August 18, 1990. The Jefferson County Jail is a facility maintained by the Jefferson County Department of Corrections, a division of Jefferson County, Kentucky government.

Plaintiff sought to hold thirteen (13) Jefferson County defendants, all Respondents to this Petition, liable for Shepherd's death. Named as a defendant in both his individual and official capacities was Richard A. Frey, Jr., Executive Director of the Jefferson County Department of Corrections at the time of the incident. Also named as defendants in both their individual and official capacities were six (6) correctional security staff who were working in the jail during the period Shepherd was incarcerated there: Sergeant Donald Copple and Officers Derek Browning, Michael Durham, Harold Adams, Dale Cornatzer and Ezell Smith.

Further, Plaintiff named as defendants the Metropolitan Department of Corrections [Jefferson County Department of Corrections] (hereafter referred to as "JCDC,") and the Jefferson County Fiscal Court. Finally, Plaintiff named as defendants Jefferson County Judge/Executive David Armstrong and Jefferson County Fiscal Court members Irvin Maze, Darryl Owens and Chris Gorman.

In addition to the thirteen Jefferson County defendants, the Complaint also originally named as defendants Correctional Medical Systems, Inc. (hereafter referred to as "CMS"), the private inmate health services provider under contract with Jefferson County, and six (6) medical or nurs-

ing professionals employed by or agents of CMS. By Agreed Order of Dismissal entered August 6, 1992, these defendants were dismissed from the action, with prejudice, as settled.[1]

Invoking the pendent jurisdiction of the Court, Plaintiff also brought a state law wrongful death claim. Plaintiff requested a declaratory judgment, and compensatory and punitive damages.

The Petitioner's statement, as contained in her Statement of the Case, that inmate Shepherd was restrained to his bunk "[f]or reasons which are not entirely clear," ignores the wealth of evidence presented in this case, which Plaintiff could not rebut.

On August 17, 1990 at 4:45 p.m., Stanley Shepherd was arrested by Louisville Police and charged with theft by unlawful taking under $100 and terroristic threatening. Shepherd was transported to the Jefferson County Jail by Louisville Police. Shepherd was booked into the jail, the booking process being completed by 6:10 p.m. Shepherd was held with a bond of $2500/10%, with arraignment set for August 18, 1990, at 9:00 a.m.

During the booking process, and in accordance with JCDC policy, Shepherd was given a health screening by CMS nurse Ann Burns, RN. During this screening, Shepherd indicated a history of epilepsy, suicidal ideation with one suicide attempt, and two current medications, Dilantin 400 mg and Doxipin 200 mg. Nurse Burns determined that Shepherd was at high risk of suicide because he scored "15 points" on the CMS suicide risk checklist. Nurse Burns ordered that Shepherd be placed on suicide precautions

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[1] By Order entered June 26, 1996, however, the Court granted Jefferson County's motion for leave to file a third-party complaint against CMS based on Jefferson County's contractual right of indemnification.

observation at ten minute intervals and issued a Suicide Observation Form.

The purpose of a Suicide Observation Form is that it is posted outside an inmate's cell and used by security staff to monitor an inmate. This particular Observation Form directed that Shepherd have no blanket, sheet, or jumpsuit. The form further instructed that Shepherd was to wear only a paper gown. The form stated that the purpose of the observation was for suicide precautions. The "Special Instructions" section of the form did not indicate that Shepherd was to be observed for seizures or delirium tremors. Security staff began suicide observation at 6:30 p.m.

Shepherd was moved from the basement booking area into a single cell located in a housing unit known as "City Side." Shepherd was placed in a paper gown and transported to his single cell without incident. Shepherd was continued on suicide observation at ten minute intervals.

Defendant Officer Harold Adams was the security posted in City Side from 11 p.m. to 7 a.m. At approximately 4:25 a.m., Officer Adams found Shepherd lying under his bunk, face down, with blood on the floor. Officer Adams immediately notified medical staff. Nurse Norene Ahart, LPN, and Physician Assistant Zeke Cannon responded.

Nurse Ahart observed that Shepherd had blood from his nose, and on his face and hands. Nurse Ahart believed that Shepherd had spread the blood on his face with his hands. Nurse Ahart also observed blood on Shepherd's paper gown, but saw no blood on the mattress.

By the time Shepherd was cleaned of the blood, the nose bleeding had stopped. Nurse Ahart observed no signs of trauma, but did see Shepherd picking at his nose. Nurse Ahart did not direct correctional staff to transport Shepherd to an outside hospital because she did not view the situation as life threatening because the nose bleeding had already stopped. Physician Assistant Zeke Cannon then

ordered that Shepherd be placed in very loose four-point restraints to keep him from picking at his nose. Cannon tripled a mattress and placed it behind Shepherd's back to put him in a semi-sitting position. Because the bleeding had stopped, Shepherd's nose was not packed with gauze at this time. Nurse Ahart checked the four-point restraints and completed the Medical Report Section in the Extraordinary Incident Report.

Sergeant Donald Copple and Officers Derek Browning, Michael Durham and Harold Adams were present at the time Shepherd was observed on the floor and were present during the four-point process. Sergeant Copple had been summoned to the unit after Shepherd was found on the floor. Officers Browning and Durham placed Shepherd into four-point restraints in accordance with the directions of medical staff.

At 6:15 a.m., Officer Adams notified medical staff that Shepherd was again bleeding from his nose. Physician Assistant Cannon and Nurse Steven Phillips responded by coming to Shepherd's cell. Shepherd's nose was packed with a nasal pack, with directions that the pack be kept in place for 24 hours. Officer Adams did not participate in the packing of Shepherd's nose by medical staff. At about 6:48 a.m., Shepherd requested to use the toilet and get a drink. Nurse Steve Phillips returned and Officer Adams released Shepherd from four-points. Nurse Phillips checked Shepherd's restraints once he was again placed in four-points.

Officer Adams continued with ten minute observations on Shepherd until approximately 7:03 a.m. During his observations, Officer Adams did not see Shepherd bleeding. Officer Adams, however, did observe Shepherd turned on his side trying to throw up. Upon notifying Physician Assistant Cannon, Officer Adams was instructed to put something on the floor.

Officer Dale Cornatzer came on duty at 7:00 a.m. to relieve Officer Adams. Officer Adams advised Officer Cornatzer of the events concerning Shepherd during the previous shift. Officer Cornatzer was also advised that Shepherd was on suicide precaution observation and was in four-point restraints. An in-cell check was conducted, and Officer Cornatzer observed that Shepherd's nose was not bleeding and that he was breathing. Officer Cornatzer conducted a suicide observation, observing only that Shepherd had turned his head.

Officer Ezell Smith, the Court Officer, went to Shepherd's cell at 8:20 a.m. to inform Shepherd of what he needed to do to prepare himself to go to court. Officer Smith looked in the cell and observed that Shepherd was lying on what appeared to be mattresses behind his head, in four-point restraints. When Officer Smith spoke to Shepherd, Shepherd shook his chains and appeared to behave in a disruptive manner. Officer Smith left and went about informing the rest of the inmates in the unit who were going to court. Officer Smith last saw Shepherd as he passed back through the unit at 8:30 a.m. Officer Smith never noticed any bleeding from Shepherd's nose.

At 8:45 a.m., Madge Swindler, RN, went to Shepherd's cell to check his restraints. At the time she came on duty that morning, Nurse Swindler had received a briefing on Shepherd from a medical personnel from the previous shift. When she arrived at Shepherd's cell, she noticed that his head and chest were elevated by a mattress folded under his head and shoulder area. Nurse Swindler did not observe any blood or vomit on Shepherd, although she noticed water on the floor. Nurse Swindler failed to get a response from Shepherd and felt a very faint, almost not palpable, radial pulse. She did not believe, however, that Shepherd was dead because of a lack of certain symptoms. Officer Cornatzer hit the emergency alarm and Nurse Swindler left to get medical equipment and oxygen. Emergency

treatment was started on Shepherd and the local emergency medical services (EMS) was notified.

Sergeant Ed Johnson also responded to the emergency alarm. He saw Shepherd lying on the bunk in four-point restraints with a mattress rolled up under his shoulders, his nose packed and taped. When he saw that Shepherd was not breathing, Sergeant Johnson also called EMS.

EMS arrived at the jail at 8:49 a.m. after receiving the call at 8:47 a.m. EMS subsequently transported Shepherd by ambulance to the hospital. The hospital notified the jail at 9:14 a.m. that Shepherd had died.

A post mortem examination was conducted on the same day. The examination revealed blood stained gauze packing inserted into the nostrils. The autopsy revealed no single anatomic cause of death. Because of evidence of blood in the bronchial tubes, however, the medical examiner's opinion was that Shepherd's death was attributed to aspiration of blood with a history of seizure disorder also being a medical condition considered as a cause of death. The medical examiner had been informed by the Coroner that Shepherd was secured by four-point restraints flat on his back. The examiner's opinion was that Shepherd, being restrained, was unable to clear the blood from his passages.

It has been the general practice of JCDC that it will not interfere with medical decisions of medical staff. Therefore, it has been the view of Jefferson County Corrections that it is the medical staff's determination as to when an inmate is restrained for medical reasons, and as to an inmate's treatment plan. Corrections staff may interact with the medical unit regarding treatment but relies upon the judgment of medical staff.

At the time of the incident, JCDC Post Order, Four-Point Restraints, provided that an inmate ordered to be

placed in four-point restraints by a supervisor, psychologist, or medical staff would be restrained on his back, on the bunk. There had been no incident previous to the Shepherd incident where an inmate had died after being four-pointed on his back.

Prior to the entry of summary judgment by the district court, there were lengthy discovery and pretrial periods granted by the Court with several trial dates postponed as a result. By Order entered May 25, 1993, the parties were given until July 15, 1993 to file amendments to the pleadings, and until September 30, 1993 to complete discovery. By Order entered December 1, 1993, a trial date was set and the deadlines were extended to allow motions for joinder of parties and amendments of pleadings until January 31, 1994, and for discovery completion by June 30, 1994. The jury trial was twice more rescheduled and, subsequent to the substitution of undersigned counsel as counsel for the Jefferson County defendants and the filing of Defendants' summary judgment motion, the pretrial compliances and trial date were again postponed by Order entered March 27, 1995. On November 9, 1995, the discovery deadline was again extended and the Defendants' summary judgment motion was remanded with leave to refile due to the extended deadlines. Finally, the discovery period was again extended to October 30, 1996.

By Memorandum Opinion and Order entered February 27, 1997, the district court granted Defendants' motion for summary judgment as to all of the Plaintiff's constitutional claims. The Court dismissed without prejudice the Plaintiff's state law claims. On June 3, 1997, the district court denied Plaintiff's motion for reconsideration. Plaintiff filed a Notice of Appeal on July 2, 1997. The United States Court of Appeals affirmed the judgment of the district court on October 29, 1998.

REASONS FOR DENYING THE WRIT

A Petition for Writ of Certiorari should be granted only when there are compelling reasons. Plaintiff has not presented any of the reasons traditionally associated with a Petition for Writ of Certiorari. Reasons traditionally associated with such petitions include, when a United States court of appeals has rendered a decision on an important matter in conflict with the decision of another United States court of appeals on the same matter, or when a United States court of appeals has decided a federal question in a way that conflicts with applicable decisions of the Supreme Court.

Plaintiff's petition is more in the nature of an appeal. All of the arguments were presented to the United States Court of Appeals for the Sixth Circuit. The Petition for Writ of Certiorari should be denied because the Sixth Circuit Court of Appeals has already reviewed Plaintiff's arguments.

Moreover, the Sixth Circuit properly affirmed the district court's judgment in favor of the Jefferson County Defendants. The district court properly read Plaintiff's Complaint as alleging only a denial of medical care claim, and properly determined that no use of force claim or assault and battery claim was alleged by Plaintiff. Plaintiff produced no evidence creating a genuine issue of *m*aterial fact as to whether jail officials, who placed inmate Stanley Shepherd in restraints and monitored him in accordance with instructions from medical staff, were deliberately indifferent to the inmate's medical needs. Further, Plaintiff produced no evidence by which to create a material issue of fact as to supervisory or municipal liability. A plaintiff, who has the burden of proof, must do more than point to matters that create only confusion and speculation, in order to defeat a summary judgment motion.

I. The Court of Appeals for the Sixth Circuit Properly Affirmed the Judgment of the District Court.

In order to state a claim under 42 U.S.C. Section 1983, a plaintiff must plead and prove that he has been deprived of a right secured by the Constitution or laws of the United States, and that the defendant deprived him of this right while acting under color of law. *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978). Moreover, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 246 (1986), *Celetex Corp.* v. *Catrett*, 477 U.S. 319, 106 S.Ct. 2548 (1986), *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). Summary judgment should be entered "if the record as a whole could not lead a rational trier of fact to find in favor of the plaintiff." *Matsushita*, 106 S.Ct. at 1356.

Therefore, the Sixth Circuit, upon reviewing the district court's grant of summary judgment *de novo*, properly affirmed the summary judgment in this action, because there was insufficient evidence for a reasonable juror to find in favor of Plaintiff based on the quantity and quality of the evidence.

The Eight Amendment analysis is applicable to pretrial detainees, who are afforded rights equal to rights of convicted persons. *Danese* v. *Asman*, 875 F.2d 1239, 1243 (6th Cir. 1989), *Roberts* v. *City of Troy*, 773 F.2d 720, 723 (6th Cir. 1985). Only the unnecessary and wanton infliction of pain invokes the Eighth Amendment. *Wilson* v. *Seiter*, 501 U.S. 294, 111 S.Ct. 2321 (1991). Therefore, the deprivation the plaintiff alleges to have occurred must be

objectively, sufficiently serious. 111 S.Ct. at 2324. Further, a plaintiff must satisfy the subjective component by demonstrating that the officials possessed "a sufficiently culpable state of mind." *Id.* at 2323. In claims involving medical care, an inmate must demonstrate that the defendants were deliberately indifferent to his obvious, serious medical needs. *Estelle* v. *Gamble*, 429 U.S. 97, 97 S.Ct. 285 (1976). An official is deliberately indifferent when under a subjective standard, he "knows of and disregards an excessive risk to inmates' health or safety; . . . ." *Farmer* v. *Brennan*, 114 S.Ct. 1970, 1979 (1994). Neither inadvertence nor medical malpractice is sufficient to establish a constitutional violation. *Estelle*, 97 S.Ct. at 291. Therefore, Plaintiff must prove the defendants acted with subjective recklessness and that their conduct was unreasonable in light of a known risk to Shepherd's health. *Farmer* at 1978-1979.

Because the Eighth Amendment is concerned with the "unnecessary and wanton infliction of pain," the infliction of unnecessary suffering due to a denial of medical care is deemed inconsistent with contemporary standards of decency. *Byrd* v. *Wilson*, 701 F.2d 592, 594, n.1 (6th Cir. 1983). Importantly, however, "conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional" under the Eighth Amendment. *Preston* v. *Smith*, 750 F.2d 530, 535 (6th Cir. 1984).

In holding that deliberate indifference to serious medical needs of an inmate constitutes a violation of the Eighth Amendment, the Supreme Court stated that deliberate indifference "is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle*, 97 S.Ct. 285, 290-291. An official who chooses to promptly summon medical assistance rather than to personally ren-

der medical aid does not violate the Constitution. *Rich* v. *City of Mayfield Heights*, 955 F.2d 1092 (6th Cir. 1992).

Therefore, an official's refusal to relay or his procrastination in relaying an inmate's request for medical attention for a serious medical need was held unconstitutional as intentional and wanton conduct. *Parrish* v. *Johnson*, 800 F.2d 600, 604-605 (6th Cir. 1986). The deliberate indifference to an inmate's serious medical needs by withholding medical care prescribed by a physician has been held as unconstitutional. *Johnson* v. *Hardin County, Kentucky*, 908 F.2d 1280 (6th Cir. 1990), *Boretti* v. *Wiscomb*, 930 F.2d 1150 (6th Cir. 1991). These decisions indicate that the conduct of correctional officers who interfere with medical treatment given by medical professionals may amount to deliberate indifference.

Plaintiff did not establish by evidence sufficient for a jury that jail officials were deliberately indifferent to Shepherd's serious medical needs. Applying the *Estelle* v. *Gamble* and *Farmer* v. *Brennan* standards, it is clear that the evidence of record supports no inference that these officers acted deliberately in disregard of an obvious need for medical attention. The four-pointing of Shepherd to the bunk was at the instruction of and with the knowledge of trained medical professionals. The record clearly establishes that the officers relied upon the presence and judgment of the medical staff. Any suggestion that these defendants should have second-guessed the judgment of medical staff is contrary to *Estelle* principles. Plaintiff did not establish that the conduct of these officials in following medical directives was unreasonable, or that these officials were aware of a known risk to Shepherd's health. *Farmer* at 1978-1979. The evidence further established that officers did monitor Shepherd's condition. The suicide observation form did not direct security staff to monitor Shepherd for possible seizures. Certainly, there is no evidence in the

record that the defendants were informed by medical staff that Shepherd could possibly aspirate on his blood from the nosebleed.

Medical staff was notified of medical problems Shepherd experienced. Officer Cornatzer was briefed on Shepherd's situation when he arrived on duty, conducted an in-cell check of Shepherd, and made observation checks every ten minutes. Officer Cornatzer took emergency measures upon recognizing that Shepherd was in danger.

There was no evidence that Officer Smith knowingly disregarded an obvious need for medical attention. First, there is no evidence that Officer Smith had even been made aware of Shepherd's medical problems during the night. *Farmer* at 1978-1979. Further, Officer Smith had not been monitoring Shepherd and therefore had no reason to suspect or detect any changes in Shepherd's condition. (*Id*). Officer Smith was not familiar with Shepherd's condition. Under the Eighth Amendment, Officer Smith was not required to undertake a screening of Shepherd to determine whether Shepherd might need medical attention. *Danese* v. *Asman*, 875 F.2d 1239, 1244 (6th Cir. 1989).

The evidence clearly does not support an inference that these Defendants knew of and disregarded an excessive risk to Shepherd's health or safety to satisfy the standard established in *Farmer* v. *Brennan*. Therefore, summary judgment was properly granted in their favor.

II. Plaintiff's Complaint Did Not Allege an Unconstitutional Use of Force Claim or an Assault and Battery Claim.

The Petition argues that a genuine issue of material fact existed as to whether an assault and battery was committed. In support, Plaintiff relied upon the deposition testimony of a medical examiner that the trauma to this

particular area of the nose was "51/49" percent caused by a blow because individuals "who are conscious and not otherwise handicapped tend to evade their fall."[2] The district court declined to consider Plaintiff's argument because no use of force allegation was made in the Complaint. The Sixth Circuit found that this determination by the district court was appropriate.

Plaintiff argues that a use of force claim was sufficiently raised in Paragraph 15 of the Complaint. Plaintiff cites only one sentence of this paragraph. Paragraph 15, in its entirety, alleges only a medical care claim and does not state a use of force or assault and battery claim:

> (15) The Defendants were grossly negligent and deliberately indifferent to the serious medical needs of the decedent. This gross neglect and deliberate indifference to the medical needs of the decedent caused the death of the decedent. The actions of the Defendants resulted also in the unnecessary and wanton infliction of pain upon Stanley Shepherd prior to his death.

Further, the Complaint alleged no facts in support of an assault and battery claim.

Alternatively, Plaintiff argues that leave to amend the complaint should have been granted to sufficiently allege physical abuse. The record, however, clearly indicates Plaintiff was given ample opportunity to amend her pleading.

The record indicates that several Pretrial Orders were entered with several deadlines given for amendment of pleadings. In addition, in November, 1995, the Court granted Defendants' motion in limine to preclude evidence of assault and battery, one ground asserted in support that this allegation was not contained in the Complaint.

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[2] There is no evidence, however, that inmate Shepherd was conscious when he fell off his bunk.

Plaintiff was given notice that Defendants did not acquiesce in this claim and had ample opportunity to amend the Complaint. Therefore, the district court properly ruled that it would not consider Plaintiff's argument there was a genuine issue of material fact as to whether inmate Shepherd was assaulted and battered.

III. There Is No Genuine Issue of Material Fact.

Plaintiff argues that a material issue of fact existed as to whether Defendants were deliberately indifferent to inmate Shepherd's serious medical needs. Plaintiff does not dispute the facts stated by the district court in evaluating the summary judgment motion. Rather, Plaintiff points to additional "evidence" which she argues creates a genuine issue of material fact. This evidence includes (1) dried vomitus found on Shepherd by EMS workers summoned to the jail, (2) hearsay statements supposedly made during the litigation by former defense counsel that Shepherd may have been restrained on his stomach; (3) evidence that Shepherd's back was no longer supported by a mattress by the time EMS arrived; (4) hearsay statements of inmates that they heard Shepherd rattling his restraints for a long period of time; and (5) evidence that Shepherd's paper gown was removed at the time EMS arrived on the scene. Defendants note that this last statement is incorrect. There was no evidence the gown had been removed; only that Shepherd was not wearing the paper gown when EMS arrived.

It has never been disputed, however, that Plaintiff was restrained on his back, especially for purposes of the summary judgment motion. Moreover, statements made by attorneys and hearsay statements should not be used to defeat a summary judgment motion. Finally, Plaintiff should not be able to defeat summary judgment by producing evidence which raises only speculation. Plaintiff's "evidence" does not address the issue in this case, of which

there is no genuine issue of material fact, of whether Defendants were deliberately indifferent to Shepherd's medical needs.

IV. Plaintiff Was Not Improperly Assigned the Burden of Proof.

Contrary to the statements made in the Petition on page 16, the district court did not agree there were disputed issues of material fact. The court found that Plaintiff did not set out evidence to defeat the summary judgment motion made by the defendants.

Plaintiff argues that to prove liability, Plaintiff was required to prove the existence of a "negative" and the evidence in support of this claim was necessarily within the sole control of the defendants, and not of the Plaintiff. Plaintiff therefore argues that the burden of proof was with the defendants who had control of all the evidence.

Plaintiff cites several Supreme Court decisions in support of his argument. *Campbell* v. *United States*, 365 U.S. 85, 81 S.Ct 421 (1961), however, concerned what course of proceedings should be taken before a trial court determines that a criminal defendant is not entitled to witness statements under the Federal Jencks Act. Under the Act, a criminal defendant is entitled to witness statements, upon motion, after the direct examination of a government witness. Under the Act, the government was not required to make these witness statements available prior to the direct examination, or even after the direct examination if documents did not fall within the Act. The existence and contents of documents were necessarily within the exclusive knowledge of the government. In *United States* v. *New York, New Haven and Hartford Railroad Co.*, 355 U.S. 252, 78 S.Ct 212 (1957), the Court addressed whether the government versus the railroad had the responsibility to determine the correctness of a bill for payment issued

pursuant to a federal statute. There, the Court engaged in statutory interpretation and a review of previous decisions to determine that the responsibility, or burden, rested with the entity having the information. Responsibilities between the government and railroads were also earlier addressed in *United States* v. *Denver and Rio Grande Railroad Co.*, 191 U.S. 84, 24 S.Ct 33 (1903). None of these Supreme Court decisions are applicable to Plaintiff's claim, which is brought pursuant to 42 U.S.C. §1983.

In a Section 1983 action, a plaintiff must plead and prove that he has been deprived of a right protected by the constitution of the United States. *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978). A Section 1983 plaintiff has this burden whether the claim is based on the existence of an unconstitutional municipal ordinance or law, or based on a policy claim that the municipality failed to adequately train its employees. *See Canton* v. *Harris*, 489 U.S. 378, 109 S.Ct 1197 (1989). Most if not all cases in which a plaintiff alleges municipality liability based on failure to train will require a plaintiff to prove a "negative" because a plaintiff must prove that specific deficiencies existed and that the deficiencies were the cause of the constitutional violation. Nevertheless, it is the plaintiff's responsibility to articulate and establish a theory of liability with evidence sufficient to be presented to the jury. Therefore, the District Court did not improperly assign the burden of proof to Plaintiff. Further, the Sixth Circuit properly affirmed the judgment.

V. Plaintiff Did Not Establish an Unconstitutional Policy or Custom Which Caused the Injuries.

It is well established that a governmental entity cannot be held liable in a §1983 action unless the plaintiff pleads and proves that the unconstitutional conduct complained of was the result of a municipal policy or custom. *Monell* v. *Department of Social Services*, 436 U.S. 658, 98

S.Ct. 2018 (1978). To satisfy the requirements of *Monell*, a Plaintiff must establish by evidence a "definitive" policy or custom which was the "moving force" behind the alleged unconstitutional conduct. *Id. Oklahoma City* v. *Tuttle*, 471 U.S. 808, 105 S.Ct. 2427 (1985). A governmental entity cannot be liable for acts of individual officers or agents absent a policy or custom causing the conduct. *Board of County Commissioners of Bryan County, Oklahoma* v. *Brown*, 117 S.Ct. 1382 (1997). *Hays* v. *Jefferson County*, 668 F.2d 869 (6th Cir. 1982).

Plaintiff produced no evidence of a municipal policy or custom which caused Shepherd's injury or death. The Jefferson County Department of Corrections' policy of four-pointing inmates in a supine position was not an unconstitutional policy because the policy was not implemented in deliberate indifference or knowing disregard of an excessive risk to inmate health or safety.[3]

Similarly, Plaintiff did not establish by evidence sufficient for a jury municipal liability under a failure to train theory. There is no evidence that a failure to train was the proximate cause of the death of inmate Shepherd. Further, there is no evidence that the training provided was so inadequate, with the need for more or different training so obvious, that the inadequacy was so likely to result in the violation of constitutional rights. *City of Canton* v. *Harris*, 109 S.Ct. 1197, 1205-1206 (1989). Although Plaintiff argues at length that proof of a single incident can establish municipal liability, Plaintiff cannot escape the responsibility of establishing by evidence proof of an unconstitutional policy that caused the violation. *Id.* Therefore, defendants were entitled to summary judgment on

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[3] Petitioner cites on page 14 of her brief JCDC Standard Operating Procedure §300.57. This SOP is not applicable because it was adopted on August 19, 1991, after Shepherd's death.

Plaintiff's municipal liability claim because Plaintiff did not produce sufficient evidence of a policy or custom resulting in the deprivation of Shepherd's constitutional right.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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